1   ANDREW P. BRIDGES (CSB No. 122761)
    abridges@fenwick.com
2   ILANA RUBEL (CSB No. 221517)
    irubel@fenwick.com
3   KATHLEEN LU (CSB No. 267032)
    klu@fenwick.com
4   FENWICK & WEST LLP
    555 California Street, 12th Floor
5   San Francisco, CA 94104
    Telephone: 415.875.2300
6   Facsimile: 415.281.1350

7   Attorneys for Defendants
    GIGANEWS, INC. and
8   LIVEWIRE SERVICES, INC.

9

10   UNITED STATES DISTRICT COURT

11   CENTRAL DISTRICT OF CALIFORNIA

12   WESTERN DIVISION

13

14 PERFECT 10, INC., a California Corporation ,	Case No.: 11-cv-07098-ABC (SHx)
15 Plaintiff,	**DECLARATION OF RONALD YOKUBAITIS IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT**
16 v.	
17 GIGANEWS, INC., a Texas Corporation; LIVEWIRE SERVICES, INC., a Nevada	
18 Corporation; and Does 1 through 100, inclusive,	
19 Defendant.	
20	
21 GIGANEWS, INC., a Texas Corporation; LIVEWIRE SERVICES, INC., a Nevada	
22 Corporation,	
23 Counterclaimants,	
24 v.	
25 PERFECT 10, INC., a California Corporation,	
26 Counterdefendant.	
27	

28

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1   I, Ronald Yokubaitis, declare pursuant to 28 U.S.C. § 1746 as follows:

2   1.   I am the Co-Chief Executive Officer of Giganews, Inc. and Vice

3   President of Livewire Services, Inc. At all times relevant to this case I have also

4   been Giganews's and Livewire's agent to receive notifications of claimed

5   infringement. I know the business and technical operations of both Livewire and

6   Giganews and have personal knowledge of the facts in this declaration.

7   **A.   Giganews's Operations**

8   2.   Giganews has been a Usenet service provider since 1994. As part of

9   its services, Giganews owns and operates Usenet servers. Giganews is one among

10   several hundred Usenet access service providers around the world.

11   3.   Giganews's servers store tens of billions of Usenet messages, all of

12   which Usenet users have uploaded. Giganews does not filter or monitor the content

13   of these messages. Nor could it.

14   4.   Giganews does not direct the actions of its subscribers in accessing

15   Usenet. To the extent a user views or posts a message, the user decides what to

16   view or post; Giganews does not select any material for upload, download,

17   transmission or storage. Nor does Giganews modify, store or transmit the material

18   that users post to Usenet.

19   5.   Giganews maintains a website at Giganews.com for general

20   information, sign-up, account management, Frequently Asked Questions, customer

21   support, and copyright-related information. This website, however, is not part of

22   the Usenet; it is however, part of the "web" (World Wide Web). It is not possible

23   to access the Usenet through Giganews's website. Giganews's web server (which

24   maintains the Giganews.com website) contains no Usenet messages or newsgroups.

25   A Giganews subscriber cannot post a message to the Usenet or retrieve a message

26   from the Usenet through Giganews's web server.

27   6.   Giganews does not buy or sell Usenet content. It only provides Usenet

28   access.

YOKUBAITIS DECLARATION IN
OPPOSITION TO MOTION FOR PARTIAL
SUMMARY JUDGMENT

1

Case No.: 11-cv-07098-ABC (SHx)

B.   Giganews's Copyright Agent and Process for Handling Notifications of Claimed Infringement

7.   Giganews submitted to the Copyright Office its current designation of agent to receive notifications of claimed infringement in January 2008. Exhibit A is a copy of that designation. It contains contact information, including e-mail and physical addresses, and telephone and fax numbers. The Copyright Office publishes the document at http://www.copyright.gov/onlinesp/agents/g/giganews.pdf. Giganews's website also makes the contact information available by providing a link to the Copyright Office's website.

8.   To understand what constitutes a proper notification of infringement on Usenet, one must understand that all Usenet content consists of messages. A Usenet message has multiple "header fields" with information about the message, including "Date," "Sender," Subject," and "Message-ID." The Message-ID is a globally unique identifier of a Usenet message. No two messages on Usenet at the same time will have the same Message-ID. There is no other ready method to identify any message uniquely and precisely. Many messages may have the same content in the Subject or other fields, but each Message-ID correlates to one and only one message.

9.   One can think of a Message-ID as equivalent to a Social Security number for a person or a credit card number for an account. With it, one can immediately identify a particular person or account.

10.   Because of Giganews's need for Message IDs in order to locate particular messages, Giganews informs visitors to its website that all notices requesting removal of infringing content must include a Message ID.[1]

---

[1] The following text appears on Giganews's website:

A properly formatted DMCA Notice will adhere to the guidelines and principals [sic] established by the DMCA itself. The necessary elements of a properly formed

YOKUBAITIS DECLARATION IN
OPPOSITION TO MOTION FOR PARTIAL
SUMMARY JUDGMENT

2

Case No.: 11-cv-07098-ABC (SHx)

C.   Giganews's Repeat Infringer Policy

11.   Giganews has a two-strike repeat infringer termination policy. The first time Giganews receives a notification that a subscriber has posted[2] allegedly infringing material, Giganews automatically suspends posting access for that account and sends the subscriber notification of the suspension. The notification warns the subscriber that Giganews's terms of service prohibit use of its systems to commit copyright infringement, and that this notification is his or her one and only warning. In order for a subscriber to regain posting access, he or she must affirm in response to the notification that he or she will abide by Giganews's terms of service

DMCA Notice are:

1. Clear identification of the person or entity submitting the DMCA Notice.
2. Clearly stated relationship to the copyright holder (self or authorized agent).
3. Message-IDs for all articles the DMCA Notice is requesting Giganews take down. Please keep in mind some files are large enough to be posted across several Usenet articles; these are called multi-part posts. Be certain to identify by Message-ID all articles you want taken down.
4. Clear statement, under penalty of perjury, that the information in the notification is accurate and that you are copyright holder, or authorized to act on behalf of the copyright holder.
5. A "physical or electronic signature" of an authorized person to act on behalf of the owner. This is fulfilled by a name and a physical address that the authorized individual can be contacted should someone wish to contest your notification.
6. While not legally required by the DMCA, including "copyright violation" in the subject line of your email will flag your DMCA Notice and bypass spam categorization.
7. Submit the Notice to dmca2008@giganews.com, the email address we have registered with the Copyright office pursuant to Section 512(c) of the Copyright Act.

The second underlined portion of point 7 above is a hyperlink to the Copyright Office's copy of Giganews's agent designation with all relevant contact information.

---

[2] Posting is the process where the User sends or uploads content, consisting of messages, to the Usenet.

YOKUBAITIS DECLARATION IN
OPPOSITION TO MOTION FOR PARTIAL
SUMMARY JUDGMENT

3

Case No.: 11-cv-07098-ABC (SHx)

1 and not infringe any copyright. If Giganews receives another notice of claimed

2 infringement identifying by Message-ID a message posted by the same account

3 after this suspension has been lifted, Giganews will permanently terminate that

4 account's posting access.

5   **D.**   **Livewire's Operations**

6   12.   Livewire is a reseller of Usenet access services. Livewire pays

7 Giganews for permission for Livewire's customers to access Giganews's Usenet

8 servers. Part of that payment is to ensure that Giganews' servers remain in

9 operation and accessible to Livewire's customers. In providing access services,

10 Livewire provides its customers with credentials to access Giganews's servers

11 directly. Livewire does not buy or sell any Usenet content.

12   13.   Livewire neither owns nor operates any Usenet servers. Instead,

13 Livewire aids customers looking for information on the Usenet by referring them to

14 Giganews's Usenet servers.

15   14.   Livewire does not direct the actions of its subscribers in accessing

16 Usenet. To the extent a user views or posts a message, the user decides what to

17 view or post; Livewire does not select any material for upload, download,

18 transmission or storage. Nor does Livewire modify, store or transmit the material

19 that is posted to the Usenet by users.

20   15.   When a new user signs up for a Livewire account, that process is

21 typically automatic. Livewire's systems automatically process recurring payments

22 from the user's credit card unless the subscriber or some other party directs

23 Livewire to stop. Livewire automatically assigns the subscriber access credentials

24 and automatically passes those credentials to Giganews.

25   16.   Livewire publishes its policies and other information but does not

26 provide Usenet access on its websites. Livewire maintains websites for general

27 information, sign-up, account management, Frequently Asked Questions, customer

28 support, and copyright-related information. These websites, however, are not part

YOKUBAITIS DECLARATION IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT   4   Case No.: 11-cv-07098-ABC (SHx)

1 of the Usenet. Mr. Zada confuses the very different Usenet and Web. In

2 Livewire's situation, Livewire leases a virtual web server from a third-party cloud

3 computing services vendor, but Livewire's web server (which maintains Livewire's

4 websites) contains *no Usenet messages or newsgroups* at all. A Livewire

5 subscriber cannot post a message to the Usenet or retrieve a message from the

6 Usenet through Livewire's web server. Instead, a Livewire subscriber must

7 separately connect to Giganews's Usenet servers to access the Usenet.

8   **E.   Livewire's Copyright Agent and Process for Handling**

9   **Notifications of Claimed Infringement**

10   17.   Livewire submitted to the Copyright Office its current designation of

11 agent to receive notifications of claimed infringement in January 2008. Exhibit B is

12 a copy of that designation. It contains contact information, including e-mail and

13 physical addresses, and telephone and fax numbers. The Copyright Office

14 publishes the document at http://www.copyright.gov/onlinesp/agents/l/livwirsv.pdf.

15 Livewire's websites also make the contact information available by providing links

16 to the Copyright Office's website.

17   18.   Because Livewire does not own or operate any Usenet servers,

18 Livewire cannot remove any Usenet messages. If copyright holders address notices

19 of claimed infringement to Livewire's DMCA agent, Livewire forwards those

20 communications to its Usenet access provider, Giganews, and it expects Giganews

21 to apply its standard responsive process.

22   **F.   Livewire Reasonably Implements a Repeat Infringer Termination**

23   **Policy.**

24   19.   When Giganews removes a message based on a notification forwarded

25 by Livewire, Giganews asks Livewire to check whether the user who uploaded the

26 message to Usenet did so through a Livewire account. If so, and it is the first time

27 Livewire has received a notification that the subscriber had posted allegedly

28 infringing material, Livewire automatically suspends posting access for that

YOKUBAITIS DECLARATION IN   5   Case No.: 11-cv-07098-ABC (SHx)
OPPOSITION TO MOTION FOR PARTIAL
SUMMARY JUDGMENT

1 account and sends the subscriber a notification of the suspension, also forwarding a

2 copy of the complaint it received. This notification warns the subscriber that

3 Livewire's terms of service prohibit use of its systems to commit copyright

4 infringement, and that this notification is his or her one and only warning. In order

5 for an subscriber to regain posting access, he or she must affirm in response to the

6 notification that he or she will abide by Livewire's terms of service and not infringe

7 any copyrights. If Livewire receives notification that a user has broken this

8 promise by continuing to post infringing materials, Livewire will permanently

9 terminate that account's posting access.

10   20.   Because Perfect 10 has never sent any notice to Livewire at its agent

11 contact address, no communication from Perfect 10 has ever triggered this policy.

12 Furthermore, to the best of my knowledge, Perfect 10 has never identified to

13 Giganews any Message-ID for an allegedly infringing message that originated from

14 a Livewire account.

15   **G.   Perfect 10's Persistent Provision of Burdensome and Defective**

16   **Notices**

17   21.   Giganews has received and processed tens of thousands of notices

18 from copyright claimants that contain lists of millions of Message-IDs.

19   22.   These notices came from a wide range of copyright claimants,

20 including Warner Bros., HBO, Lionsgate Films, the Entertainment Software

21 Association, the Recording Industry Association of America ("RIAA"), Microsoft,

22 and NBC Universal. These entities sometimes send thousands of notices

23 concerning millions of Message-IDs. A copyright owner can submit a single notice

24 to cover thousands or more messages.

25   23.   Giganews handles notices expeditiously. The processing times vary

26 by complexity of notices and volume of notices at a particular time, but typically it

27 takes less than 48 hours to remove messages where the copyright holder has

28 provided a well-formed notice with a list of Message-IDs.

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

24.   It is not difficult for a copyright holder to provide Message-IDs that
identify infringing messages. Giganews has received DMCA notices from
copyright holders identifying hundreds of millions of allegedly infringing messages
by Message-ID, and Giganews has removed every one of those messages.

25.   Of all copyright owners that have communicated with Giganews
regarding allegedly infringing materials on the Usenet, Perfect 10 is the only one
that persistently refuses to send Message-IDs for all messages it believes contain
infringing material. Unlike other copyright holders with large portfolios, it refuses
to work with Giganews to send notices that Giganews can process expeditiously.

26.   When copyright holders have cooperated with Giganews and accepted
Giganews's suggestions, they have readily been able to submit notices with
Message-IDs and Giganews has then been able to quickly remove all allegedly
infringing messages. For example, a number of years ago, a law firm representing
Sony Music had difficulties sending proper notices under the DMCA. It exhibited
confusion between the technical Internet protocol standard for the World Wide
Web, HTTP (hypertext transfer protocol), and the Internet protocol standard for
Usenet, NNTP (network news transfer protocol). As such, it issued defective
notices that failed to provide the Message-IDs or Message Headers to locate the
allegedly infringing materials on Giganews's Usenet servers. As part of
Giganews's efforts to assist copyright claimants, Giganews informed Sony Music's
lawyers about third-party services, in that instance BayTSP, which prepare and send
DMCA notices that include the Message-IDs or Message Headers on behalf of
copyright claimants. After providing the contact information for BayTSP,
Giganews received numerous DMCA-compliant notices from Sony Music's
authorized representative. Giganews promptly deleted the Usenet messages that
they identified.

27.   Even when Perfect 10 provides Message-IDs, it does so only for a
small subset of the messages it wants removed, and it does so in a manner that is

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

YOKUBAITIS DECLARATION IN
OPPOSITION TO MOTION FOR PARTIAL
SUMMARY JUDGMENT

7

Case No.: 11-cv-07098-ABC (SHx)

1 inefficient for both the copyright holder and the service provider. Perfect 10

2 provides screenshot images that depict a Message-ID and refuses to provide a list of

3 Message-IDs in clear, digital, machine-readable text as other copyright holders do.

4   28.   Perfect 10's practice of refusing to provide Message-IDs for the vast

5 majority of messages it wants to take down is not only unique among copyright

6 holders in Giganews's experience. It is also downright perverse. It is clear – even

7 in the screenshots that Perfect 10 attached to some of its notices (see, for example,

8 Exhibits 11 to 13 of the Zada Declaration) – that, when Perfect 10 searches and

9 finds messages its wants to take down, in that process it finds the Message-IDs of

10 the messages. But instead of furnishing us those Message-IDs, which would allow

11 us to zero in on infringing messages accurately and quickly, Perfect 10 merely

12 gives us instructions on how to repeat the process Mr. Zada went through. It wants

13 us to cover all the steps Mr. Zada took, and then take the extra step he didn't take of

14 collecting the Message-ID to enter into our system.

15   29.   We have explained over and over again to Perfect 10 and Mr. Zada our

16 desire to assist Perfect 10 combat infringement just as we have assisted some of the

17 largest copyright holders in the world. We have offered to help discuss ways to

18 streamline the process for Perfect 10 to submit valid notifications with Message-

19 IDs. But Perfect 10 has shown no interest in helping us help it curb infringement.

20 We have concluded that Perfect 10 is more interested in fighting copyright battles

21 against Internet companies than it is in minimizing infringement of its copyrights.

22   30.   When on occasion Perfect 10 has included Message-IDs in

23 screenshots that it included in its communications, to process them Giganews had

24 review the screenshots and manually re-type the Message-IDs based on what we

25 could discern from the screenshot image (often a thumbnail image screenshot).

26 This greatly slowed the identification and removal process and introduced the risk

27 of inadvertent error through typographical mistakes or difficulty discerning similar-

28 looking characters, such as the number one ('1') versus the lowercase letter L ('l').

1   While it would take seconds for Perfect 10 to copy and paste a Message-ID from a

2   message header into the body of an email or into a spreadsheet, Giganews instead

3   has to physically study the images Perfect 10 provides, try accurately to detect a

4   Message-ID from those images, and then manually retype the Message-IDs into its

5   system. This is a far more time-consuming and labor-intensive process than would

6   be required if Perfect 10 provided Message-IDs in clear text, as other copyright

7   holders do. Giganews could process thousands of Message-IDs in a matter of

8   minutes where the Message-ID is properly provided. Nevertheless, Giganews has

9   in every instance processed the notices and removed messages where Perfect 10 has

10   provided Message-IDs, even in this inconvenient and burdensome format.

11   31.   There are faster and more efficient ways for a copyright holder such as

12   Perfect 10 to provide lists of Message-IDs than taking screenshots. I have reviewed

13   the Declaration submitted by Norman Zada in which he claims at Paragraph 24 that

14   it would take four months to provide 54,000 Message-IDs. This is simply not true:

15   other copyright holders have provided Giganews millions of Message-IDs in a

16   single month, month after month. For the twelve month period from November 6,

17   2012 to November 6, 2013, Giganews removed 1,367 messages at P10's request.

18   During this same time period, Giganews removed approximately 531,512,900

19   messages for other copyright holders.

20   32.   If Perfect 10 says there are 54,000 messages that infringe upon its

21   rights, that number would be one approximately hundredth of one percent of our

22   takedowns for one year. By Mr. Zada's calculation of his pace of finding 13,500

23   message-IDs per month that he says it would take Perfect 10, and by using his

24   method, it would have taken other copyright holders an aggregate of over 3000

25   years of their staff time to assemble and send Message-IDs to us for one year of

26   takedowns. That means something is badly wrong with Mr. Zada's system.

27   Professional notification services can quickly locate and assemble Message-IDs on

28

YOKUBAITIS DECLARATION IN   9   Case No.: 11-cv-07098-ABC (SHx)
OPPOSITION TO MOTION FOR PARTIAL
SUMMARY JUDGMENT

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1   a bulk basis and format and send DMCA notices that include the Message-IDs or

2   Message Headers on behalf of copyright claimants.

3   33.   Perfect 10 may complain that it does not want to bear the cost of

4   professional copyright notification services. But in other contexts I understand that

5   it complains about the costs and burdens of litigation. If Perfect 10 wished to curb

6   infringement, surely the cost of the notification services would be far cheaper than

7   the cost of litigation. That is true, of course, only if Perfect 10 really wants to curb

8   infringements instead of litigating for windfall statutory damages as part of a

9   business plan.

10   **H.   Overview of Perfect 10's Communications with Giganews**

11   34.   Exhibit C is a copy of a letter, dated March 25, 2009, that Giganews

12   received from Norm Zada of Perfect 10, Inc. That letter included a DVD

13   containing over 1400 pictures of naked women, which Perfect 10 called a

14   "sampling of its copyrighted materials." The cover letter claimed materials

15   infringing Perfect 10's rights existed on the Usenet but provided no information

16   identifying the location of such material. Instead, Perfect 10 demanded that

17   Giganews search for and identify allegedly infringing material itself.

18   35.   Exhibit D is a letter, dated April 7, 2009, that I, as Giganews's

19   designated agent, sent to Norman Zada of Perfect 10, Inc. It stated: "Each and

20   every article posted to a Usenet server has its own unique Message ID. We cannot

21   locate any article without the Message ID and therefore Giganews will need the full

22   headers and/or Message-Ids to find the specific infringing material and remove it."

23   In that letter, I asked Perfect 10 to "[p]lease, help us, to help you, protect you or

24   your members' copyrights, by always sending electronically the articles' headers

25   and Message-IDs."

26   36.   Perfect 10 did not contact Giganews again for more than two years. In

27   2011, it began sending new notices, often in short succession at odd hours. Perfect

28   10's typical notice states that Perfect 10's agent, Norman Zada, searched on the

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1   Usenet using third-party software, either in a particular newsgroup or generally, for

2   a particular term, and downloaded "infringing" images. The notices would also

3   include thumbnail images of allegedly "infringing" images of naked women and

4   screenshots of search results. The notices would not state exactly which messages

5   Perfect 10 believes contained infringing material.

6   37.   In August 2011, Perfect 10 sent a set of notices that stated that Mr.

7   Zada searched in a particular newsgroup on a particular date with particular third-

8   party software and that "[a]ll of the images that appear as a result of that search are

9   copyright by Perfect 10." Exhibits 9-10 of the Zada Declaration (Dkt. No. _) are

10 part of this set. None of the notices contained any Message-IDs.

11   38.   Although these notices did not comply with the requirements for

12 DMCA notices, Giganews nevertheless voluntarily undertook to process them by

13 taking the steps that Perfect 10 itself should have taken. Giganews used third party

14 software to search that newsgroup for the same term, checked that no search result

15 was of a message posted after the date of Mr. Zada's search, retrieved the message

16 header for each search result, extracted the Message-ID from each header, and

17 proceeded to process this list of Message-IDs as if Perfect 10 had provided the

18 Message-IDs.

19   39.   This procedure was far more burdensome and time consuming than the

20 steps Giganews has taken to process notices from any other copyright holder. It

21 required Giganews active to search Usenet for allegedly infringing material. If

22 Giganews had to undertake such efforts as to all of the hundreds of millions of

23 messages that have been subject to DMCA takedown requests, Giganews could not

24 operate its business.

25   40.   In October 2011, Perfect 10 stopped sending notices to Giganews for

26 more than a year.

27   41.   In March 2013, Perfect 10 resumed sending notices. Starting in May,

28 2013, Perfect 10 began sending a new set of notices. Some of the screenshots

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1 Perfect 10 sent in this group displayed a few isolated Message-IDs. For each

2 Message-ID that was visible, Giganews removed the corresponding message from

3 its servers.
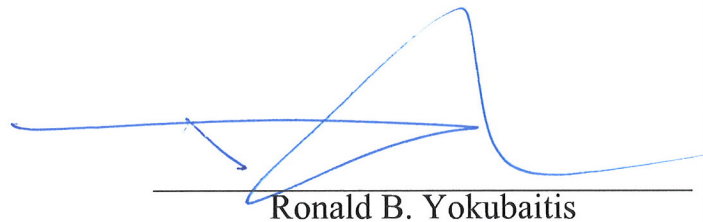
4   42.   We have removed a total of 3336 messages at Perfect 10's request

5 since June 2011.

6   43.   I have never seen a request from Perfect 10 to Giganews claiming that

7 an entire newsgroup (i.e., every message in that group) infringed Perfect 10's

8 copyrights. Removing an entire newsgroup that targeted and infringed upon a

9 particular copyright holder's rights would be technologically straightforward and

10 would not require any message-by-message review or searching and manual

11 extraction of Message-IDs.

12   44.   Giganews stands ready to assist Perfect 10 in eliminating

13 infringements of its copyrights on the Giganews Usenet service. All we need is for

14 Perfect 10 to give us what we get from other copyright holders, and we could carry

15 out the takedowns expeditiously.

16   I declare under penalty of perjury that the foregoing is true and correct.

17 Executed on November 25, 2013.

18

19

20   Ronald B. Yokubaitis

21

22

23

24

25

26

27

28